No. 73-1074

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE ROGERS MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. The Board found that petitioner ("the Company") violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by insisting on superseniority for replacement employees as a condition of granting reinstatement to strikers, and by refusing to meet and bargain with its employees' certified bargaining representa-

tive[1] (Pet. App. A57). The Board further found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by delaying and withholding offers of reinstatement to strikers, by offering striking employees reinstatement only on condition that they return as new employees, and by offering reinstatement to jobs not substantially equivalent to those held by the employees prior to the strike (*ibid.*). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement to the strikers and make them whole for any loss of earnings resulting from the Company's discrimination, and to bargain with the Union upon request (Pet. App. A58-A61). The court of appeals enforced the Board's order (Pet. App. A1-A10).

2. Petitioner does not contest the Board's findings that it violated Section 8(a)(1), (3), and (5) of the Act. Petitioner's sole contention is that the action of the Trial Examiner in making 172 changes in the transcript of testimony (Pet. App. A67-A74) denied it due process of law. This issue does not warrant review by this Court.

As the court below noted, and petitioner recognizes (Pet. 7), a trial judge has "sua sponte power to correct the record in accordance with his memory" (Pet. App. A10). The court below correctly concluded that

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[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1610, UAW ("the Union").

the Trial Examiner did not abuse that power here. As the examiner pointed out, the corrections were "based not only on [the examiner's] recollection of his own remarks, as well as those of the witnesses and counsel, but also on extensive notes taken by him at the hearing, and the context in which the questioned items appear" (Pet. App. A78). Moreover, before making the changes, the examiner afforded petitioner an opportunity to consult its witnesses and the reporter's notes and to show why such changes should not be made (Pet. App. A67, A78).

Most of the changes in the transcript consisted of corrections of typographical errors (Pet. App. A64-A74). Petitioner's principal complaint relates to the addition of the words "superseniority" to the testimony of union representative Peter Costello. The court of appeals correctly concluded that petitioner had not suffered any prejudice from the correction:

> We are satisfied from a review of the record that the modification of the testimony is corroborated by testimony by the same witness to the same effect in two other places in the transcript, neither of which are challenged by the Company. * * * [Pet. App. A10.][2]

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[2] Union representative Peter Costello testified as follows:

Q. Referring you to December 3, 1969, did you attend a negotiating meeting at that time?
A. Yes, I did.
Q. Would you tell us what happened at that meeting?
A. We discussed again about the strikers coming back to work and it was said the strikers would be returned and the nonstrikers would have super-seniority

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

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and this we discussed and disagreed with. [Court of Appeals App. 42.]

Costello affirmed this testimony under questioning by the Trial Examiner (Court of Appeals App. 47).

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